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February 20, 2018

VIA CERTIFIED MAIL
Bois Forte Band of Chippewa
1610 Farm Road South
Tower, Minnesota 55790

VIA CERTIFIED MAIL
Bois Forte Public Works Department
1430 Bois Fort Road
Tower, Minnesota 55790

**Re: Notice of Violation and Intent to File Suit Under the
Federal Clean Water Act**

Dear Readers:

I am writing on behalf of Clean Water and Air, LLC ("Clean Water and Air") in regard to violations of the Federal Water Pollution Control Act, 33 USC § 1251 et. seq. (the "Clean Water Act" or "CWA"). Clean Water and Air is a Minnesota entity formed for the purpose of working to clean up waterways and fight for clean air by seeking to ensure enforcement of laws like the Federal Clean Water Act and Clean Air Act. The purpose of this letter is to put the owners and operators of the Bois Forte Lake Vermillion Wastewater Treatment Facility ("Fortune Bay" or "the Facility"), located on the Bois Forte Indian Reservation, Tower, Minnesota, St. Louis County on notice of Clean Water and Air's intent to file a citizen suit under Section 505 of the Clean Water Act to secure appropriate relief for the ongoing and continuing violations of the Facility's National Pollutant Discharge Elimination System ("NPDES") permit No. MN-006131-4 including, but not necessarily limited to, unlawful discharges of pollutants from the Facility into waters of the United States, which are in turn violations of the Clean Water Act, as described herein. This notice applies to all violations occurring within the five years immediately preceding the service of this notice letter to the full extent contemplated by the standard set forth in *Public Interest Research Group of New Jersey v. Hercules*, 50 F.3d 1239 (3rd Cir. 1995).

The Clean Water Act

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251 (a). To achieve those goals, Section 301(a) of the CWA expressly prohibits the "discharge of any pollutant" where such discharges do not comply with the terms of any applicable NPDES permit. 33 U.S.C. §§ 1311(a), 1342. "Discharge of a pollutant" means any "addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutant is defined to include "industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernable, confined and discrete conveyance," 33 U.S.C. § 1362(14), and navigable waters are broadly defined as "the waters of the United States." 33 U.S.C. § 1362(7).

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Once regulated by an NPDES permit, discharges must strictly comply with all of the terms and conditions of the permit. 40 C.F.R. § 122.41. Violation of the terms or conditions of an NPDES permit is a violation of the Clean Water Act. *Id.* Once a court has determined that a defendant has violated the CWA, it must impose civil penalties. See e.g. *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990). Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Clean Water Act subjects the violator to a penalty of up to \$32,500 per day per violation for violations between April 20, 2007 and January 12, 2009, \$37,500 per day per violation for all violations after January 12, 2009, \$51,570 per day per violation for all violations after November 2, 2015 and \$52,414 per day per violation for all violations after January 15, 2017. See also, e.g., *Natural Resources Defense Council v. Southwest Marine*, 236 F.3d 985 (9th Cir. 2000) (everyday a facility is operated in violation of its NPDES permit is a separate and distinct violation of the permit and the CWA).

In addition to civil penalties, the CWA provides for appropriate injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief. Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties or substantially prevailing parties to recover costs, including attorneys' and experts' fees associated with this enforcement action.

CWA Citizen Suit Provision

Section 505 of the CWA authorizes citizens to bring suit against any person who is "alleged to be in violation" of an effluent standard or limitation under the CWA. 33 U.S.C. § 1365(a). Effluent limitation is defined broadly to include "a[n] [NPDES] permit or condition thereof issued under section 1317 of this title," and "any unlawful act under subsection (a) of 1311 of this title." 33 U.S.C. § 1365 (f). 33 U.S.C. § 1365(b), requires that 60 days prior to the initiation of a civil action under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), citizens must give notice of their intention to sue. Notice must be given to the alleged violator, the Administrator of the United States Environmental Protection Agency ("EPA"), the Regional Administrator of the EPA, the Executive Officer of the water pollution control agency in the state in which the violations are occurring, and, if the alleged violator is a corporation, the registered agent of the corporation. See 40 C.F.R. § 135.2. The purpose of the notice requirement is to allow the parties to negotiate and resolve the dispute before litigation is commenced. *New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co., Inc.*, 72 F.3d. 830, 833 (10th Cir. 1996).

The Bois Forte Reservation Fortune Bay Wastewater Treatment Facility

The Bois Forte reservation is located in northern Minnesota, about 45 miles south of the Canadian border. The Bois Forte band owns and operates Fortune Bay Resort and Casino, The Wilderness Golf Course, WELY-End of the Road Radio, Powertrain Manufacturing, Inc., the Y-Store and Bois Forte Wild Rice. Fortune Bay's wastewater treatment facility operates pursuant

to NPDES permit No. MN-0061310-4 and consists of a 3-cell wastewater stabilization pond system, each cell being approximately 5.1 acres. The facility has a controlled discharge to a wetland area which drains to Lake Vermillion's Pike Bay. The Facility is designed to treat an average influent flow of 75,000 gallons per day. The wastewater treatment system provides service for the Fortune Bay Casino, hotel and conference center, and reservations homes.

Violations at Issue

NPDES permit holders are required to prepare and submit discharge monitoring reports (DMR's) 40 C.F.R. § 122.41. Facilities report discharges on DMR's, which their implementing authorities record into EPA databases. See e.g., *EPA Technical User Background Document for the Discharge Monitoring Report (DMR) Pollutant Loading Tool*, Version 1.0, January 2012. Courts have repeatedly held that data reported in DMR's constitute admissions by the permittee and are sufficient to conclusively determine that a permit violation has occurred. Courts apply a five-year statute of limitations for Citizens seeking to enforce the Clean Water Act. *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 75 (3d. Cir. 1990), *cert denied*, 489 U.S. 1109 (1991).

Exhibit A attached hereto includes an image of the facility and United States Environmental Protection Agency enforcement and compliance documents including a Detailed Facility Report and Effluent Limit Exceedances Report based upon facility DMR's. Exhibit A demonstrates, among other things, as follows:

- The Facility's Current CWA compliance status: "noncompliance;"
- Non-compliance for five of the last 12 quarters;
- Exceedances of the permit limits approximately 25% of the time; and
- 484 days with effluent exceedances in the previous five years.

In addition to specific effluent limitations, the Facility's permit also requires that the permit holder "shall at all times properly operate" the Facility and in accordance with an asset management program which includes adequate funding, operator staffing and training, rehabilitation and replacement of assets when necessary. See also 40 C.F.R. § 122.41 (e) ("Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures."). Every day a facility is operated in violation of its NPDES permit is a separate and distinct violation of the permit and the CWA. *Natural Resources Defense Council v. Southwest Marine* (supra).

The violations at issue here are especially significant because Lake Vermillion is an exceptionally scenic freshwater lake in the heart of Minnesota's northern wilderness. Lake Vermillion is heavily used by visitors who lodge at the lake's numerous resort and hotels. The Facility lies in close proximity to camp grounds, hiking trails, heavily used public beaches, heavily used fishing and recreational waters, and residences and cabins.

The maximum penalty amount associated with Fortune Bay's 484 days with effluent exceedances in the previous five years totals in excess of Twenty-Five Million Dollars (\$18,000,000.00). To the extent it is determined that the Facility was not being operated properly for the past five years, the maximum penalty amount would total well in excess of Fifty Million Dollars (\$50,000,000.00).

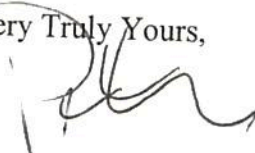
Conclusion

Upon expiration of the 60-day notice period, Clean Water and Air intends to file a citizen suit under Section 505(a) of the Clean Water Act for the above-referenced violations, and for any similar violations that occur after the date of this notice letter. In so doing, Clean Air and Water seeks to improve the water quality and safety of Minnesota's waters by securing compliance with applicable law; the maximum penalty available under the law, and appropriate injunctive relief.

During the 60-day notice period, Clean Water and Air is interested in discussing effective remedies for the violations noted in this letter, and actions that might be taken to ensure future compliance with the Clean Water Act. However, if you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions with the undersigned within the next 20 days so that they may be completed before the end of the 60-day notice period. Clean Water and Air does not intend to delay the filing of a complaint in federal court if discussions as to an appropriate resolution continue when that period ends.

If you have information suggesting that one or more of the violations outlined in this notice letter did not occur or is stated incorrectly, please immediately provide that information, specifying the violation in question. The 60-day notice period would also be the appropriate time to inform Clean Water and Air of any steps already taken to remedy the violations discussed in this notice.

Very Truly Yours,



Patrick W. Michenfelder

PWM/tjs
Encl.

cc. Mr. Scott Pruitt (*Environmental Protection Agency Administrator*)
Ms. Cathy Stepp (*EPA Regional Administrator - Region 5*)
Mr. John Line Stine (*Commissioner of MPCA*)
Client